POLICE OFFICERS HELD NEGLIGENT IN CREATING EMERGENCY SITUATION

Dyson v. Schmidt
109 N.W.2d 262 (1961)

Alleging negligence, plaintiff brought this action against defendant police officers for injuries inflicted by a bullet fired by one of the officers. The injury occurred when one of the defendants returned the fire of a suspected felon whom the officers were attempting to apprehend. The Supreme Court of Minnesota, in a case of first impression, affirmed the trial court's holding that the jury could find that the officers negligently created an emergency situation and that this negligence was the proximate cause of plaintiff's injuries.[1]

Defendants, on special duty as plainclothesmen, saw a suspected felon in the darkened theater where plaintiff was employed as assistant manager. The officers decided to wait until intermission to make the arrest because they were not positive of the suspect's identity and did not call for additional help because they feared uniformed police would attract a crowd. The officers knew the suspect was dangerous, likely to be armed, and would possibly resist arrest. During the intermission, Officer Harken approached the suspect and asked him for identification. The suspect brandished a pistol, ran toward the outer lobby, and fired two shots at the officers on the way. Officer Schmidt ordered the suspect to halt and fired two shots when he failed to obey. One of the bullets hit the suspect and the other struck the plaintiff who was in the outer lobby and could not be seen by the defendants.

Two fundamental interests of society come into sharp conflict in this area of the law: the interest of society in the apprehension of criminals and the interest in the preservation of life. In order to reach a just determination, the court must balance these interests. Police officers have a duty to arrest criminal suspects, and they are permitted to use such force as is reasonably necessary to carry out this duty.[2] However, the utility of arresting criminals is only one side of the balance, and law enforcement officers are generally held liable for negligently carrying out their duties.[3]

The general rule stated by the court that police officers are not liable for injuring a bystander in emergency situations, absent conduct

[1] One justice dissented, stating: "I am of the opinion that the defendants here were free from negligence as a matter of law." Dyson v. Schmidt, Minn., 109 N.W.2d 262, 270 (1961).

[2] Chaudoin v. Fuller, 67 Ariz. 144, 192 P.2d 243 (1948); Lentine v. McAvoy, 105 Conn. 528, 136 A.76 (1927); Pedilla v. Chavez, 62 N.M. 170, 306 P.2d 1094 (1948); Askay v. Maloney, 85 Ore. 333, 166 P.29 (1917).

[3] Annot. 18 A.L.R. 197 (1921); Annot. 39 A.L.R. 1306 (1925); Annot. 60 A.L.R.2d 873 (1958); Note, "The Civil Liability of Police Officers for Wounding or Killing," 28 U. Cin. L. R. 488 (1959).

on their part in creating the emergency, is inconsistent with traditional negligence concepts. The rule thus stated does not require the officers to conform to the standard of conduct of the ordinarily prudent officer under the circumstances of the emergency.[4] In effect, this rule would allow officers in an emergency situation to escape liability for any conduct, provided they were not negligent in creating this emergency. This result is questionable as it completely eliminates society's interest in preserving life from the court's consideration. Rather than absolving the officer of liability as a matter of law, it would be preferable to hold him to a standard of conduct which is reasonable under the circumstances. The emergency situation should be only one of the factors considered by the court in determining whether the officers acted negligently.[5]

The specific holding of the instant case may be interpreted, from the viewpoint of causation, as an extension of policy liability because no prior reported decision has held officers negligent in *creating* an emergency.[6] The courts have held police officers liable for injuring bystanders in two situations: where the fleeing person was not a felon suspect[7] and where the circumstances are such that it was negligent for the officer to fire.[8] In the first situation it is said that the officer was not justified in shooting at a misdemeanant, whereas negligence in the second case is based upon the circumstances under which the officer fires. Thus a police officer has been held negligent for firing at a suspect on a crowded street.[9]

It is doubtful whether either theory was applicable in this case. As to the first, the officer was justified in firing at one he reasonably believed to be a felon. The applicability of the second theory is complicated because

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[4] U.S. v. Jasper, 222 F.2d 632 (4th Cir. 1955); Triestram v. Way, 286 Mich. 13, 281 N.W. 420 (1938); Dahlstrom v. Hurtig, 209 Minn. 72, 295 N.W. 508 (1940); Prosser, Torts 137-138 (2d ed. 1955); Evans, "The Standard of Care in Emergencies," 31 Ky. L.J. 207 (1943).

[5] Luper Transp. Co. v. Barnes, 170 F.2d 880 (5th Cir. 1948); Jones v. Boston and Me. R.R., 83 N.H. 73, 139 A. 284 (1927); Prosser, *op. cit. supra* note 4, at 138.

[6] However, the Oklahoma Supreme Court, in reversing and remanding Shaw v. Lord, 41 Okla. 347, 137 Pac. 885 (1914), gave the following instructions:

> ". . . if there should be evidence to show that without greater risk of the escape of Smith, the arrest might . . . have been effected elsewhere, or in a different manner, or by different means than it was, with less danger of injury to bystanders as a result of such resistance, the defendant being informed and believing Smith was dangerous to the extent hereinbefore stated; it would not be improper to submit to the jury the question as to whether defendant was in that respect guilty of actionable negligence in failing to exercise due care for the safety of bystanders . . ."

[7] Day v. Walton, 199 Tenn. 10, 281 S.W.2d 685 (1955); Young v. Kelley, 60 Ohio App. 382, 21 N.E.2d 602 (1938); Locke v. Bralley, 50 S.W.2d 410 (Tex. Civ. App. 1932).

[8] Davis v. Hellwig, 21 N.J. 412, 122 A.2d 497 (1956) (public street); Cook v. Hunt, 178 Okla. 477, 63 P.2d 693 (1936) (bank); Shaw v. Lord, *supra* note (hotel lobby); Askay v. Maloney, *supra* note 2 (public street).

[9] Davis v. Hellwig, *ibid.*

the justification of self defense must be considered and because the plaintiff could not be seen by the firing officer. The court makes no reference to other circumstances which could have made the firing negligent in itself. The "emergency doctrine," which considers the emergency an element in determining negligence, is inapplicable because the conduct of the officers created the emergency, and it would be unjust to permit an individual to profit by his mistakes.[10]

The court permitted the jury to impose liability on the theory that the officers' conduct created the emergency and stated that negligence could be predicated on the officers' lack of care in initially approaching the suspect or because other precautions were not taken.[11] After this conduct is found to be negligent, the issue becomes one of causation. The intervening criminal act of the suspect does not necessarily break the causal chain because the jury could reasonably conclude it was foreseeable that a dangerous suspect would resist arrest.[12] There are some activities in which emergencies must be anticipated and the actor must be adequately prepared to meet them.[13] This principle should be considered as applicable to police officers who are attempting to apprehend a dangerous felon.

The result reached in this case is consistent with traditional negligence concepts. Liability was based upon the creation of an unreasonable risk of harm with a resulting injury which was within the scope of the risk created.[14] The policy question presented is whether a police officer should be absolved from liability for conduct which would otherwise be considered negligent because of society's interest in the apprehension of criminals. It seems desirable that not only the utility of the officer's conduct should be considered, but also the manner in which the conduct is performed.[15] The safety of bystanders is a sufficiently important interest to require police officers to use reasonable care in the apprehension of criminals.

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[10] Ellis v. McCubbins, 312 Ky. 837, 229 S.W.2d 992 (1950); Gibbs v. Guild, 333 Mich. 671, 52 N.W.2d 542 (1952); Saeger v. Canton City Lines, 78 Ohio App. 211, 69 N.E.2d 533 (1946); Prosser, *op. cit. supra* note 4, at 138.

[11] Dyson v. Schmidt, *supra* note 1, 109 N.W.2d 262, 270.

[12] Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949); Blessing v. Welding, 226 Iowa 1178, 286 N.W. 436 (1939); Abbot v. New York Pub. Library, 263 App. Div. 314, 32 N.Y.S.2d 963 (1942); Arneil v. Schnitzer, 173 Ore. 179, 144 P.2d 707 (1944); 38 Am. Jur., Negligence § 71 (1941). *But cf.* Scott v. City of New York, 2 App. Div. 854, 155 N.Y.S.2d 787 (1956).

[13] Prosser, *op. cit. supra* note 4, at 138.

[14] Palsgraf v. Long Island Ry. 248 N.Y. 339, 162 N.E. 89 (1928).

[15] 2 Restatement Torts § 291 (1934) states:

"Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the *particular manner* in which it is done." [Emphasis added.]